

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: March 31, 2021

Mailed: April 2, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Ultra Pro International, LLC
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Serial No. 87570853
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Amanda Westfall of Keener and Associates, P.C.
for Ultra Pro International, LLC.

Jacquelyn A. Jones, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Wolfson, Coggins, and Hudis,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Ultra Pro International, LLC (“Applicant”) seeks registration on the Principal Register of the mark CHROMAFUSION (in standard characters) for:

Plastic holders in the nature of sleeves having an opaque side and a translucent side specifically adapted for holding and protecting collectible trading cards and for use in card game competitions and tournaments,

in International Class 16; and

Plastic protective sleeves having an opaque side and a translucent side for gaming cards and specifically adapted for use in card game competitions and tournaments; Plastic holders in the nature of sleeves having an opaque side and

a translucent side specifically adapted for holding and protecting game cards and for use in card game competitions and tournaments,

in International Class 28.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the following marks, owned by the same entity and registered on the Principal Register, as to be likely to cause confusion, to cause mistake, or to deceive:

- U.S. Reg. No. 4352791 for the standard character mark CHROME for "Trading cards" (registered with a claim of acquired distinctiveness under Section 2(f));²
- U.S. Reg. No. 2251239 for the typed³ mark TOPPS CHROME for "Trading cards" (CHROME disclaimed);⁴ and
- U.S. Reg. No. 2265679 for the standard character mark BOWMAN CHROME for "Trading cards."⁵

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for

¹ Application Serial No. 87570853 was filed on August 16, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intent to use the mark in commerce.

² Issued June 18, 2013; Combined Trademark Act Sections 8 & 15 Declaration accepted and acknowledged.

³ Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012).

⁴ Issued June 18, 2013; Combined Trademark Act Sections 8 & 15 Declaration accepted and acknowledged.

⁵ Issued July 27, 1999; Renewed.

reconsideration, the appeal was resumed. Applicant subsequently requested remand to introduce additional evidence, and the application was returned to the Examining Attorney for consideration of Applicant's new evidence. The Examining Attorney thereafter maintained the refusal, introduced additional evidence, and returned the case to the Board for resumption of the appeal. As discussed below, we reverse the refusal to register.

I. Evidentiary Issue

Before turning to the merits of the appeal, we address an evidentiary matter resulting from Applicant's attachment to its brief of some new and some duplicate evidence.

With regard to the duplicate evidence, all evidence filed during the prosecution of the application comprises the record on appeal, and need not be reintroduced either by Applicant (or the Examining Attorney) at briefing. *Calypso Tech., Inc. v. Calypso Cap. Mgmt., LP*, 100 USPQ2d 1213, 1218 (TTAB 2011); *see also In re Info. Builders Inc.*, 2020 USPQ2d 10444, *1 n.4 (TTAB 2020) ("Exhibits to briefs that merely duplicate evidence already in the record are of little or no use in an ex parte proceeding.").

With regard to the new evidence, the Examining Attorney properly requests that the Board disregard such new evidence. The record in an application should be complete prior to the filing of an appeal, and the Board will not normally consider

newly filed evidence that was not made of record during prosecution. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).⁶

Upon careful review of the record, we note that Exhibits E and H to Applicant's Brief and two photos (at 11 TTABVUE 18) were untimely.⁷ The remainder appear to be duplicate copies of evidence made part of the record during prosecution. We have given no consideration to the newly added material or Applicant's related arguments in its brief. Nonetheless, because the excluded material is not outcome determinative, our disregard of same has no effect on the result in this case.

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors

⁶ The Examining Attorney did not identify which materials submitted by Applicant with its brief were newly filed and which were duplicates, but requested generally that the Board disregard Applicant's "new evidence with its appeal brief that was not previously made of record in the form of several exhibits appended to and images included in Applicant's Brief." Examining Attorney's Brief, 13 TTABVUE 5. Although there is no prohibition against making a general objection, the better practice is to differentiate any new evidence from the remainder and object, on the basis of timeliness, to newly filed evidence only. A general statement presumes that the objection goes to the entirety of the submission, which may lead to a misperception of the scope of the objection. The better practice alerts the Board to the specific objection and conserves its scarce resources in accurately evaluating the record.

⁷ All citations in this opinion to the appeal record are to TTABVUE, the docket history system for the Trademark Trial and Appeal Board. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. Citations to the prosecution history of the application are to pages from the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). *In re Consumer Protection Firm PLLC*, 2021 USPQ2d 238, *3 n.3 (TTAB 2021).

set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); see also *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir. 2020) (“Not all *DuPont* factors are relevant in each case . . .”). Two key considerations are the similarities between the marks and the relatedness of the goods. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Relatedness of the Goods

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). The goods need not be identical, but “need only be related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant's goods in Class 16 include plastic sleeves for holding and protecting collectible trading cards, and Registrant's goods are "trading cards." These goods are functionally related, and as identified would likely be used and purchased together, making them complementary. Complementary goods are typically used, served, or consumed together and found when encountering one good while purchasing the other. *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014) (finding spices included in recipes complementary as integral ingredients to be used together); *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1587 (TTAB 2013) (finding surge protectors, wall mounts and brackets complementary as purchasers likely to encounter them together during course of purchasing a television, audio or home theater system); *Am. Drill Bushing Co. v. Rockwell Mfg. Co.*, 52 CCPA 1173, 342 F.2d 1019, 1022 (1965) (drill bits and drill brushings are complementary products).

Applicant's goods in Class 28 are plastic protective sleeves for "gaming cards" and plastic holders in the nature of sleeves for "holding and protecting game cards." There is no definition in the record for "gaming cards" or "game cards." There is a definition of record for "trading cards" that is broad enough to cover gaming or game cards, namely: "a card with a picture or design printed on it, often one of a set collected and traded by children." June 23, 2020 Final Office Action, TSDR 2. Based on this definition, Registrant's "trading cards" are deemed to encompass gaming and game cards. Therefore, Registrant's trading cards and Applicant's "plastic protective sleeves" and "plastic holders in the nature of sleeves" in Class 28 are also complementary products.

Applicant argues that the goods are not related because its goods are entirely unsuitable for trading cards, given that the sleeves are opaque on one side. However, in evaluating whether the goods are related or complementary, we must base our determination on the goods as identified in the application and cited registrations, rather than what occurs in the marketplace. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“It was proper ... for the Board to focus on the application and registrations rather than on real-world conditions, because ‘the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application.’”) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)); see also *In re Iolo Techs.*, 95 USPQ2d 1498, 1500 (TTAB 2010) (finding likelihood of confusion where “based on the identifications themselves” the goods are “complementary in function and purpose”).

The second *DuPont* factor favors a finding of likelihood of confusion.

B. Channels of Trade

The third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Detroit Ath. Co.*, 128 USPQ2d at 1052 (quoting *DuPont*, 177 USPQ at 567). The Examining Attorney has shown that both Applicant’s and Registrant’s types of goods are sold online by the same third-party vendors under a single mark. For example, Pokémon Center sells card sleeves and cards under the mark POKÉMON TCG. November 16, 2017 Office Action, TSDR 8-9. Dave & Adam’s sells card sleeves for “Dragon Shield Yu-Gi-Oh!” as well as basketball cards and

“Magic the Gathering Cards.” June 7, 2018, Suspension Notice, TSDR 43, 45-48 and 50-55. This shows that, at least, the respective goods are sold through the same online channels over the Internet.

The third *DuPont* factor weighs in favor of a finding of likelihood of confusion.

C. The Marks

Under the first *DuPont* factor, we compare the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d at 1812). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs.*, 101 USPQ2d at 1721; *see also Edom Lab’ys, Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012)).

Although Applicant’s mark CHROMAFUSION and each of the cited registered marks, CHROME, TOPPS CHROME and BOWMAN CHROME, include the letter string CHROM, the additional elements in each of the composite marks result in marks that are different in appearance, sound, meaning and commercial impression.

We focus our analysis on the mark CHROME of Registration No. 4352791 because Applicant's mark CHROMAFUSION more closely approximates that mark than the other cited marks. If we find that there is no likelihood of confusion with this registered mark in connection with Applicant's listed goods, there would be no likelihood of confusion with the other registered marks. *See, e.g., N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1225 (TTAB 2015) (citing *In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010)).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161.

The marks CHROME and CROMAVISION are somewhat similar in appearance and pronunciation due to the shared element "CHROM." Nonetheless, they convey substantially different connotations and overall commercial impressions. Whereas the term "chrome" is defined as "chromium plate as a decorative or protective finish

on motor-vehicle fittings and other objects,” June 7, 2018 Suspension Letter, TSDR 2, the term “chroma” is defined as “purity or intensity of color.” *Id.*, at 4. An additional distinction is introduced by the Dictionary.com definitions of “chroma” and “chrome.” Dictionary.com defines “chroma” as “1. the purity of a color, or its freedom from white or gray. 2. intensity of distinctive hue; saturation of a color.” March 4, 2020 Request for Reconsideration, TSDR 6. In contrast, “chrome” is defined as “chromium-plated or other bright metallic trim, as on an automobile.” *Id.* at 19. The metallic chromium trim on automobile fittings, such as bumpers, is typically a silvery color, the direct opposite of a fusion of intense, saturated hues.

Moreover, the term CHROMA is not separable from the remainder of Applicant’s mark. Rather, together with the word FUSION, it forms part of a unitary, compound mark. See TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1213.05(a) (Oct. 2018). As the U.S. Court of Appeals for the Federal Circuit notes:

A unitary mark has certain observable characteristics. Specifically, its elements are inseparable. In a unitary mark, these observable characteristics must combine to show that the mark has a distinct meaning of its own independent of the meaning of its constituent elements. In other words, a unitary mark must create a single and distinct commercial impression. This test for unitariness [includes an examination of] ... the meaning of the words and how the meaning relates to each other and to the goods...

Dena Corp. v. Belvedere Int’l, Inc., 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). We find that CHROMAFUSION meets this test, and it therefore is a unitary mark.

Consumers are unlikely, therefore, to remember and recall the mark simply as CHROMA, but will remember and refer to it in full as CHROMAFUSION, imagining

a confluence of intense colors merged together. The definition of “fusion” supports this understanding inasmuch as “fusion” is defined as “the process or result of joining two or more things together to form a single entity.” June 7, 2018 Office Action, TSDR 72.

Given the significant differences discussed above, Applicant’s CHROMAFUSION mark and Registrant’s CHROME mark engender very different overall commercial impressions when the marks are considered in their entireties. *See, e.g., Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135 (Fed. Cir. 2015) (noting the Board acknowledged its “obligation to consider the marks in their entireties” in evaluating “the ‘appearance, sound, connotation’ of the two marks”).

The first *DuPont* factor weighs heavily against a finding of likelihood of confusion.

III. Summary and Conclusion

For the reasons discussed above, we conclude that Applicant’s mark is not likely to cause confusion with the cited registered marks CHROME, TOPPS CHROME, or BOWMAN CHROME, when those marks are used on or in connection with the goods identified in the application and cited registrations. Moreover, we find this factor to be dispositive, in that even when used on related goods that travel through at least some of the same online trade channels, Applicant’s mark is so different from Registrant’s marks that confusion is unlikely. This factor of the dissimilarities of the marks simply outweighs the other factors. *See Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) (“a single [*DuPont*] factor may be dispositive in a likelihood of confusion analysis, especially

when that single factor is the dissimilarity of the marks “); *Odom’s Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) (“[E]ven if all other relevant *DuPont* factors were considered in [opposer’s] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.”); *Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991).

Decision:

The refusal to register Applicant’s mark CHROMAFUSION is reversed.